# INDEX

## Subject Index

## Table of Cases Cited

AUTHORITIES CITED

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1961**

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**No. 81**

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THOMAS N. GRIGGS

*v.*

COUNTY OF ALLEGHENY

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## BRIEF OF AIRPORT OPERATORS COUNCIL, AS AMICUS CURIAE.

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### The Interest of Your Amicus

This brief is submitted by the Airport Operators Council, *amicus curiae*, with the permission of both parties. The Airport Operators Council is a non-profit organization

consisting of the various governmental * agencies, authorities, commissions, boards and departments which operate the principal airports in the United States.

AOC member airports serve over 75% of the nation's domestic scheduled airline passengers and almost 100% of its overseas international airline passengers. Its members operate the public airports at such cities as Baltimore, Boston, Chicago, Cleveland, Denver, Honolulu, Houston, Kansas City, Los Angeles, Miami, New York, Oakland, Philadelphia, San Francisco and Seattle. Included herein as Appendix A is a list of Airport Operator Council members, together with the airports which they operate.

Your *amicus* has a vital interest in this litigation because of petitioner's contention that Allegheny County, the owner and operator of the Greater Pittsburgh Airport has, as a matter of Federal constitutional law under the 5th and 14th Amendments

> "appropriated without due process of law an easement in the air space above petitioner's property and is liable for the damages sustained under the doctrine of *U.S.* v. *Causby*, 328 U.S. 256." (Petitioner's brief, p. 35)

It is to refute this contention as well as to show that the constitutional issues which petitioner raises should not be decided by this Court, that the AOC, as the organization

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* The only non-governmental members are Lockheed Air Terminal, Inc., a private corporation which operates the Burbank, California, airport; and the Airlines National Terminal Service Company, Inc., a private corporation which operates the Detroit-Willow Run Airport, Detroit, Michigan. Additionally, the United States government operates Washington National Airport; and we have several non-United States members as well. None of the members mentioned in this footnote, however, have participated in this brief or in the proceedings leading to its authorization.

which represents the interests of the nation's airport operators, respectfully submits this brief.

## The Decision Below

Petitioner, a property owner in the vicinity of the Greater Pittsburgh Airport, together with four other landowners, commenced actions in equity against certain airlines using the Airport and the County of Allegheny, the owner and operator of the Airport. The complaints alleged continuing unlawful and dangerous trespasses by aircraft over the properties of the respective plaintiffs, as well as "takings" of these properties.

The Pennsylvania Supreme Court, in 402 Pa. 411, 168 A. 2d 123 (1961), vacated an award by a Board of Viewers against Allegheny County in the amount of $12,690 as petitioner's damages for a "taking" of his property allegedly occasioned by the County's operation of the Airport.

The court's holding was placed on the ground that the County could not be the efficient legal cause of a "taking" resulting from the flights of planes, since the County exercised no control over any of the aircraft of which complaint was made. In so ruling, the court rejected the County's argument that the air space in question was part of the public domain through which Congress had granted a free right of transit. The court was of the opinion that the Civil Aeronautics Authority had not prescribed minimum safe altitudes of flight for aircraft while landing and taking-off.

This Court granted certiorari in 366 U.S. 943 (1961).

## Petitioner's Contentions Before This Court

Petitioner asserts that the decision of the Pennsylvania Supreme Court has deprived him of his property without

due process of law in violation of the 5th and 14th Amendments to the United States Constitution. He asks this Court to reverse that decision on the following three grounds, each of which is a separate point in his brief:

1) a reversal is required under *United States* v. *Causby*, 328 U.S. 256 (1946);
2) the remedy indicated by the Pennsylvania Supreme Court for the damages petitioner sustained is erroneous as a matter of Pennsylvania law, and, in any event, is illusory; and
3) there is no remedy by way of injunctive relief by a State court since it would violate Federal law.

Your *amicus* will argue that each of petitioner's three grounds for urging a reversal of the Pennsylvania Supreme Court's decision is erroneous.

## Summary of Argument

Our first two points will demonstrate that the constitutional questions which petitioner raises should not be decided by this Court. Since the opinion below holds that petitioner possesses other remedies under State law to vindicate his alleged rights and, in addition, it is clear that petitioner has Federal remedies, *Point I* argues that this Court cannot at this stage of the proceedings hold that the Commonwealth of Pennsylvania, acting through its courts, has denied petitioner his 14th Amendment due process rights.

Moreover, since a decision on the constitutional questions petitioner raises may ultimately be unnecessary after petitioner exhausts his remedies under State and Federal law, *Point II* contends that this Court should not now pass upon these constitutional questions.

*Point III* shows that far from supporting petitioner's contention that it is the airport operator who is liable for any alleged "taking" of his property, this Court's decision in *United States* v. *Causby*, 328 U.S. 256 (1946) indicates that if anyone at all is liable it is not the airport operator but rather the operator of the offending aircraft or the Federal government which provides the highways in the air.

Lastly, *Point IV* argues that the flights in question are immunized from liability by the applicable Federal statutory and administrative scheme of air traffic control since they are within the nation's navigable air space through which Congress has declared a free right of transit to exist comparable to the public easement of navigation in navigable waters. Accordingly, the County cannot be held liable for the damages allegedly caused petitioner by those flights. If it is contended that the Federal regulatory scheme resulted in a taking of the petitioner's property that is a question which does not involve the County but is one solely between petitioner and the United States.

## Point I

**The Commonwealth of Pennsylvania, Acting Through Its Courts, Has Not Taken Petitioner's Property in Violation of the Constitution's Due Process Clause Since the Pennsylvania Supreme Court Has Indicated That Petitioner Has Other Remedies Available Under State Law to Vindicate His Alleged Rights, and it is Clear That Petitioner Has Additional Remedies Under Federal Law.**

The sole basis, under the Constitution, for petitioner to be before this Court is the 14th Amendment's provision that no State shall

> "* * * deprive any person of life, liberty or property without due process of law."

Petitioner contends that the Commonwealth of Pennsylvania, acting through its highest court, has violated this provision of the 14th Amendment (and also the 5th Amendment, as incorporated into the 14th Amendment) by "taking" his property without compensation and hence without due process. We cannot agree.

The Pennsylvania Supreme Court in the very decision which petitioner asks this Court to reverse, after referring to *United States* v. *Causby*, 328 U.S. 256 (1946), held that petitioner

> "should look for relief to the owners or operators which have made the complained of flights through the airspace above his land".

The Pennsylvania Supreme Court also noted that

> "such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. § 1469"

which statute the Court proceeded to quote in full.

This Court has repeatedly held that

> "The due process clause does not guarantee to the citizen any particular form or method of procedure." *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930).

See also *Bauman* v. *Ross*, 167 U.S. 548 (1897); *A. Backus & Sons* v. *Fort Street Union Depot Co.*, 169 U.S. 569 (1898); *McCoy* v. *Union Elevated R'way Co.*, 247 U.S. 354 (1918).

Thus, petitioner will not be denied due process if fair compensation is made available to him under state law.

As Mr. Justice Stone stated for the Court in *Dohany* v. *Rogers*, *supra*, (p. 366):

> "We cannot assume that under the procedure prescribed by the State for the taking of appellant's land he will not be entitled to receive or will in fact be denied the just compensation which the Constitution guarantees."

See also opinion of Mr. Justice Frankfurter, dissenting in *Walker* v. *Hutchinson*, 352 U.S. 112 (1956).

In view of the express holding that plaintiff has a remedy available to him under State law, it is impossible to see how petitioner under the above cases can argue to this Court that the Commonwealth of Pennsylvania has violated his Federal constitutional right to due process by denying only the particular remedy he seeks in this action.

Petitioner evidently realizes the weakness of his position, since he goes on to argue (a) that the Pennsylvania Supreme Court misconstrued the Pennsylvania statute on which it relied, (b) that the remedy which the Pennsylvania Supreme Court has held petitioner possesses is in reality illusory, and (c) that a state court injunction against the flight of commercial aircraft would violate Federal law. By making these arguments, petitioner, in effect, concedes that the opinion below, at least on its face, cannot be said to violate due process. Petitioner's arguments of erroneous statutory construction, illusoriness of a state court remedy in tort, and violation of Federal law are each without merit.

Petitioner asserts that:

> "The section of the Pennsylvania statute suggested by the Pennsylvania Supreme Court does not authorize action for damages to property caused in the regular movement of air traffic." (Petitioner's brief, p. 23)

Petitioner's contention flies in the face of this Court's well settled rule that the interpretation or meaning given to state statutes by a state's highest court will not be reviewed or reconsidered by this Court. In *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 680 (1930), Justice Brandeis set forth this familiar rule:

> "the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state."

and

> "the mere fact that a state court has rendered an erroneous decision on a question of law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court."

See also *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959); *Neblett* v. *Carpenter*, 305 U.S. 297 (1938); *Iowa Central Railway Co.* v. *Iowa*, 160 U.S. 389 (1896). Accordingly, under Pennsylvania law, as interpreted by that Commonwealth's highest court, it is clear that petitioner has, as that court ruled, a remedy against

> "the operators of the aircraft which have made the complained of flights through the air space above his land." 402 Pa. 411, 168 A. 2d 123 (1961).

Petitioner contends that the remedy given him by the Pennsylvania Supreme Court is illusory even though he has not tested or exhausted this remedy. Hence at the very best his contention that the remedy is illusory is mere speculation. In *Rescue Army* v. *Los Angeles*, 331 U.S. 549 (1947) and *Parker* v. *County of Los Angeles*, 338 U.S. 327 (1949) this Court refused to review asserted constitutional

questions upon finding that petitioners in those cases could yet seek remedies in the State courts. In *Parker* v. *County of Los Angeles*, *supra*, this Court said (p. 332):

> "If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitively denied their claims under State law. Due regard for our Federal system requires that this court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law."

As a matter of law, then, petitioner cannot contend that his State remedies are illusory until he has exhausted them. But even factually it is clear that the State remedies still available are not illusory. Petitioner is, in effect, arguing that Allegheny County should be liable to him as a matter of constitutional law because the proof required to sustain tort actions which he has brought and which are still pending against the County as well as against the airlines may be inconvenient for him to secure. But difficulty in proving a cause of action in tort has never been equated with a denial of due process.

This is aside from the fact that the proof which this petitioner himself has submitted to the Board of Viewers in the instant condemnation action certainly shows that a tort remedy for trespass is meaningful and far from illusory. A review of petitioner's own proof before the Board of Viewers destroys his argument as to the illusory quality of a state remedy in tort.* We do not mean to indi-

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* In fact, the Record before this Court indicates that petitioner had no difficulty in identifying the airplanes that flew over his property (R. 20-25). The complete Record, the one before the Supreme Court of Penn-

cate that the court below was prepared to hold that the airlines are liable to petitioner. What the court said is that the County is not liable, and that if petitioner wishes relief, he should sue the airlines and see whether he can establish a case against them. It is important to note that the County did not introduce any evidence of its own to rebut petitioner's proof of monetary loss. Instead, the County chose to rely on its legal position.

What we mean to emphasize is that the state courts have great discretion and wide power to award a litigant adequate relief, whatever the form of action, provided he proves his case. Certainly the courts have in the past met and solved more difficult problems of measuring and allocating damages among joint or several tort feasors.

Furthermore, in *City of Newark, et al.* v. *Eastern Air Lines, Inc., et al.*, 159 F. Supp. 750 (D.N.J. 1958), a Federal district court held in a closely analogous case that there can be a remedy in trespass against airlines and did not consider that remedy illusory.

At all events, petitioner is in no position under the above cases to allege the illusory quality of a remedy given him in good faith by the highest court of his State, before he has tried it in the lawsuit which he still has pending against the airlines and the County.

A basic fallacy inherent in petitioner's entire argument arises from an ambiguous use of the word "taking". Petitioner contends his property has been "taken" and that therefore this case is like a proceeding in eminent domain. Since, contends petitioner, he has not been paid compensation under the Commonwealth's eminent domain procedure, he has been denied due process. But his property has not

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sylvania, indicates further, *inter alia*, that the identity of the planes which used the northeast runway could be ascertained by comparing the schedules of flight and the wind records which are maintained by the Weather Bureau (R. 107-108).

been taken by eminent domain and the 14th Amendment does not require that state courts treat somewhat analogous situations as if they were identical. If there has been a taking, such taking is in the nature of an interference with the use and enjoyment of his property by flights of aircraft. Such a taking may be analogous to some extent with a taking by eminent domain, but it is also analogous to the interference with the use and enjoyment of property which is represented by the common law terms of "trespass" and "nuisance". It cannot be said that the Pennsylvania Supreme Court was arbitrary in holding that the mode of procedure to recover compensation for such an interference should be by a tort suit rather than one in eminent domain.

If the present controversy is left in the field of tort law, and not placed in that of constitutional taking, then there is scope, as there ought to be, for the tort doctrines of active and passive tort feasors, contribution and contractual idemnification which can then come into play as between the alleged tort feasors. Petitioner's position would deny the airport operator the contemporaneous right to have these normal protections.

In *Causby, supra,* upon which petitioner relies, this Court stated that the taking occasioned by the flights of government aircraft resulted from repeated and continued *trespasses.* If this Court were now to hold that petitioner's 14th Amendment rights have been violated, it will, in reality, be holding that the 14th Amendment requires that petitioner's remedy is properly brought for compensation in eminent domain against a party which has no control over the flights of aircraft rather than for compensation against the actual operators of the aircraft causing the disturbance for wrongful trespass or against the Federal Government

which provides the highways in the air which are used by the aircraft.

The *Causby* decision is itself authority to the contrary (see *Point III* below), and the 14th Amendment neither turns a tort into a constitutional question, nor prescribes particular procedural forms to be followed in state litigation. Furthermore, constitutional due process is not violated by requiring a property owner to look for compensation to a nongovernmental person taking or interfering with his property under authority or permission of the State or Federal government. *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Strickley* v. *Highland Boy Gold Min. Co.*, 200 U.S. 527 (1906).

Except for the immunization we believe Congress has conferred on flights through the nation's navigable airspace (see *Point IV* below), there is no doubt that the commercial airlines can be held liable in damages for their torts without interfering with the Federal regulatory scheme of air traffic control or otherwise violating Federal statutory or constitutional law. Unlike the overwhelming majority of airport operators who are public agencies, the commercial airlines, though regulated by the Federal Government, are private profit-making corporations and if in the course of their operations they commit torts, it cannot seriously be asserted that placing monetary liability on them imposes any greater burden than that incurred when they pay their suppliers for materials or their employees for services. In short, the cost of such burden is as much an economic incident of airline flights as the cost of the fuel consumed on those flights.

It should be borne in mind that it is the airlines and not the airport operators who, subject to FAA safety criteria, choose the kind and type of aircraft to be flown. If the airlines for their own commercial profit choose to use

heavier and noisier aircraft than that in use five, ten or fifteen years ago, no reason exists why the airport operator and not the airlines should be liable for whatever damages are incurred by the use of such equipment. Note in this connection *Highland Park Inc.* v. *United States*, 161 F. Supp. 597 (1958), where the Court of Claims held that no "taking" of the claimant's property occurred when the United States flew over the property conventional piston aircraft but a "taking" did occur when the Government discontinued the use of piston type aircraft, substituting in their place much noisier jet aircraft.

Furthermore, while it is true that the airlines have to obey Federal flight rules and Federally imposed flight patterns, it is most emphatically not true that they have no control over the altitudes at which their planes fly over petitioner's property. The wide variation in altitude found by the Board of Viewers in the present case demonstrates this.*

The fact is that the airlines have control,—again within applicable FAA safety criteria—over the altitudes at which their aircraft fly. They exercise their control initially when they determine how much money to spend for research into the flight characteristics of potential aircraft including research in noise suppressor devices. They exercise their control when they determine which of the available types of aircraft they are going to purchase. They continually exercise their control in their day-to-day flight operations. It is well known that aircraft can rise much more rapidly if they have lighter loads and while under

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* The Board of Viewers accepted petitioner's proposed Finding of Fact that planes flew over his property from 30 to 300 feet on take-offs and from 53 to 153 feet on landing. The Board of Viewers also inconsistently adopted the proposed Finding of Fact made by the County that aircraft flew over petitioner's property at indeterminate altitudes (R. 34, 48, 53).

given circumstances this might mean that an airline might have to reduce its load to avoid liability in tort and thus suffer an economic penalty, no reason exists why the airport operator should be held liable as a matter of constitutional law because an airline decides in its own economic self-interest to use heavy loads and thus ascend over given property at lower altitudes. Also, we should observe that while the airlines do operate under Federal certificates, they have them only because they wanted them and applied for them in furtherance of their interests. It is to be assumed they would have no great difficulty in having them cancelled if they prove hardship.

Petitioner finally contends that since he could not obtain or determine damages, only an injunction could protect his rights. But petitioner contends that such relief, if granted against the airlines by a state court, would violate Federal law under the authority of *Allegheny Airlines, et al.* v. *Village of Cedarhurst*, 238 F. 2d 812 (2 Cir. 1956). However that might be, the fact is that it is petitioner who has brought an action for injunctive relief in the Pennsylvania courts instead of the Federal courts and that action is still pending. It is difficult to understand how he can now ask this Court to decide that the Pennsylvania courts in which he has brought that action lack the power to give him the relief he is seeking or other alternate adequate relief. Moreover, it cannot be contended that the *Cedarhurst* decision, *supra*, bars a Feder l court from granting petitioner injunctive relief. In addition, there are available to petitioner Federal administrative remedies under which he may obtain the essence of injunctive relief through section 1002 of the Federal Aviation Act of 1958 (72 Stat. 788, 49 U.S.C. 1482). Petitioner has not as yet availed himself of this type of relief.

There can be no doubt that the Federal administrative

agencies can give petitioner whatever relief they deem is warranted by virtue of their plenary jurisdiction over air traffic rules and flight patterns. See, in this connection, *Allegheny Airlines, et al.* v. *Village of Cedarhurst et al., supra; City of Newark, et al.* v. *Eastern Airlines, Inc. et al., supra,* and *Point IV* hereof.

In the *Newark* case, an action was brought for injunctive relief and damages by five municipal and six individual plaintiffs against seven airlines using Newark Airport. The Federal District Court dismissed that portion of the complaint seeking an injunction on the ground that plaintiffs should first have sought relief before the appropriate Federal administrative agency. The court observed that the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958) vests in the appropriate Federal regulatory agency (p. 758):

> "* * * a comprehensive authority to regulate by rule and order every aspect of interstate air commerce, and specifically empowers it to prescribe and revise from time to time: 'Air traffic rules governing the flight of, and for the navigation, * * * of, aircraft, including *rules as to safe altitudes of flight* and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.'" (Emphasis, the Court's)

The court then noted that such regulations may be amended and pointed out (p. 759):

> "The Civil Aeronautics Board, fully aware of the broad powers vested in it, has by regulation, § 301.40, 14 C.F.R., reserved to 'any interested person' the right to 'petition the Board for the issuance, amendment, modification, or rescision of any Civil Air Regulation.'

> The pertinent regulations § 301.41, et seq., prescribe a simple and flexible procedure which may be followed by a petitioner. The rule, as we construe it, reserves to any person whose interests are adversely affected by any regulation, the right to petition for relief."

The court went on to dismiss that portion of the complaint seeking injunctive relief, saying (p. 759):

> "If, on petition of the plaintiffs and after investigation and hearing, the Civil Aeronautics Board amends either the present regulations or the operations specifications, or both, a further resort to this Court will be clearly unnecessary."

Certainly, with this type of relief still available to petitioner, this Court cannot hold as a matter of law that he has been deprived of his due process rights, at least at this stage of the proceedings.

It is significant that since the *Newark* decision, the new Federal Aviation Agency (which largely absorbed the functions of the old Civil Aeronautics Administrator and certain rule-making powers of the Civil Aeronautics Board) has issued so-called anti-noise traffic patterns for specific airports. Thus, on September 3, 1960, the Federal Aviation Agency issued new Air Traffic Rules for New York International Airport, the preamble to which states in part that

> "A major purpose of this regulation is to reduce the aircraft noise disturbance to persons on the ground • • •". 25 Fed. Reg. 8538 (1960).

The preamble observes that

> "The most direct solutions presently feasible include rearrangement of local traffic flow, use of prescribed

preferential runways and traffic rules to establish the maximum altitudes of flight consistent with safe landings and take-offs." 25 Fed. Reg. 8538 (1960).

In addition, the Rules state that the FAA currently 'requires' certain types of aircraft to "be equipped with engine noise suppressors" which effect a substantial reduction of engine noise.

Your *amicus* does not know what the precise situation is at the Greater Pittsburgh Airport, but wishes to point out to this Court that in the new rules relating to New York International Airport, the Federal Aviation Agency made such comments as the following:

> "Prohibition of the use of these runways is a measure designed to reduce aircraft noise and the action was taken only after due consideration of safety requirements. The Agency realizes that under certain conditions, it may be necessary to utilize these runways; therefore, this rule provides the New York International Airport Traffic Control Tower the necessary flexibility to authorize deviations when necessary. However it is emphasized that such authority will be used sparingly." 25 Fed. Reg. 8539 (1960).

and

> "In addition to the benefits accruing to safety, the requirement that small, less noisy aircraft operate in the lower strata of airspace and the larger and more noisy aircraft at the higher altitudes will serve to relieve the problems resulting from aircraft noise. * * *" 25 Fed. Reg. 8539 (1960).

Similar "Airport Traffic Area Rules" for the Los Angeles International Airport had previously been issued by the Federal Aviation Agency. 25 Fed. Reg. 1764 (1960). In issuing the Los Angeles Air Traffic Rules, the FAA pointed out:

> "These operating rules were developed in order to enhance the safety of all aircraft operations in this area and to provide for the protection of persons and property on the ground." 25 Fed. Reg. 1764 (1960).

The issuance of these air traffic patterns and rules by the FAA is in complete accord with the decision in the *Newark* case. It demonstrates that it is entirely possible for petitioner to get adequate relief administratively. As a matter of fact, the FAA can impose, in terms of decibels, or otherwise, ceilings on the amount of noise it will permit aircraft to make when flying over property in the course of their operations. It must be emphasized that petitioner is afforded judicial review of these administrative proceedings. See §1006 of the Federal Aviation Act [49 U.S.C. §1486 (a)] and *Schwab* v. *Quesada*, 284 F. 2d 140 (3 Cir. 1960).

To conclude: Despite the fact that the Pennsylvania Supreme Court pointed out that petitioner has a remedy under state law and despite the fact that petitioner has an additional remedy under Federal law, petitioner nevertheless asks this Court to hold at this stage of the proceedings that the decision below violates his 14th Amendment due process rights. We respectively submit that under these circumstances this Court should not hold at this time that the Commonwealth of Pennsylvania has denied petitioner his 14th Amendment due process rights.

## Point II

**A Decision on the Constitutional Questions Petitioner Is Now Raising May Ultimately Be Unnecessary After Petitioner Exhausts Other Remedies Available To Him Under State and Federal Law. Accordingly, This Court Should Not Now Pass Upon the Constitutional Issues Petitioner Raises.**

On innumerable occasions this Court has held that it will rule on important questions of constitutional law only if there is no other way in which the Court can decide the case without determining the constitutional question. This rule is based upon broad considerations of the approapriate exercise of judicial power. As stated in *Parker* v. *Los Angeles County*, 338 U.S. 327, 333 (1949), Mr. Justice Frankfurter, speaking for the Court,

> "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

*Accord*, *Clay* v. *Sun Insurance Office*, 363 U.S. 207 (1960); *Neese* v. *Southern Railway Co.*, 350 U.S. 77 (1955); *Alma Motor Corp.* v. *Timken Detroit Axle Co.*, 329 U.S. 129 (1946); *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316 (1945); *cf.*, *Barr* v. *Mateo*, 355 U.S. 171 (1957). The constitutional question need not now be decided in this case and decision may ultimately be unnecessary since to quote from *Parker* v. *Los Angeles County*, *supra*,

> "If their claims are recognized by California courts petitioners would of course have no basis for asserting denial of a Federal right." (p. 332).

The present case is analogous to those cases where this Court has refused to decide federal questions concerning state court decisions or state statutes where the state courts have not fully or finally interpreted the state law involved; See, *Meridian* v. *Southern Bell Telephone & Teleg. Co.*, 358 U.S. 639 (1959); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Government & C.E.O.C., CIO* v. *Windsor*, 353 U.S. 364 (1957); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

As the record now stands, petitioner is requesting this Court to do precisely what it has continuously held it should not do. If petitioner resorts to the other remedies noted in *Point I*, above, which are presently available to him including prosecuting to completion in the Pennsylvania courts his pending actions in tort against the airlines and the County, a decision on the constitutional questions he now raises might never become necessary. Accordingly, this Court should not pass upon them at this time.

## Point III

### Far From Supporting Petitioner's Argument That It is the Airport Operator Who Is Liable for Any Alleged "Taking" of His Property, This Court's Decision in Causby Indicates that If There Is Any Liability, Is Is Not Imposed on the Airport Operator.

If, in spite of the arguments to the contrary, this Court feels that the constitutional issues raised by petitioner should now be decided, we believe that the decision below is correct and should be affirmed. Petitioner's principal reliance in seeking a reversal of that decision is *United*

*States* v. *Causby*, 328 U.S. 256 (1946). Far from supporting petitioner this Court's decision in *Causby* destroys his argument that it is the airport operator who is liable for any alleged "taking" of his property.

While acknowledging the similarity between his own situation and that in *Causby*, petitioner has misstated and deemphasized the crucial facts of *Causby* and has misconstrued its rationale. Thus, petitioner states that:

> "In *Causby*, supra, the United States operated both the airport and the aircraft * * *." (Petitioner's brief, p. 15).

The fact is that in *Causby*, the United States did not operate the airport.

The Court of Claims specifically found that:

> "2. The Greensboro-High Point Municipal Airport Authority operates an airport covering a considerable acreage of land, under and by virtue of an enabling Act, of the North Carolina Legislature, passed in 1941 * * *." *Causby* v. *United States*, 60 F. Supp. 751, 752 (Ct. Cl. 1945).

The lease between the Greensboro-High Point Airport Authority and the United States included a clause which reserved to the Airport Authority the right to contract with any other person for the use of the Airport.

> "13. Nothing contained herein shall prevent Lessor from entering into a contract or lease with any other person, firm or corporation for the use of the Airport, or any part thereof, or for any concession thereon, provided said contracts or leases shall be made subject to the terms of this lease." (R. 314).

The record before this Court in *Causby* is replete with testimony of both civilian and military personnel to the effect that the Airport Authority—and not the United States—operated the Greensboro Airport.

The Secretary of the Airport Authority offered the following uncontradicted statement:

"49. Q. By what other parties is the airport used?
A. The Airport Authority at the present time has leases outstanding with the Weather Bureau for quarters in the Administration Building; with the Civil Aeronautics Administration for quarters in the Administration Building; with Eastern Airlines for use of the runways, and facilities in the Administration Building. The Airport Authority operates its own hangers, too, and leases hanger space to private citizens for storage of their own private planes, who in turn use the airport runways." (R. 274)

The Commanding Officer of the Army Air Station testified:

"13. Q. Has the Army had any control over the business office located on the airport grounds?
A. None whatever." (R. 188)
"14. Q. Has the Army had any control over the data and operations office located on the airport ground?
A. None whatever." (R. 188)

The Business Manager of the Airport was also interrogated as to the operations of the Airport. His testimony is as follows:

"12. Q. In regard to the use by the Army of the airport, does the Army have any control of the business management of the airport?

A. No." (R. 253-254)

"14. Q. In regard to the use by the Army at the airport, does the Army have any control over the administration at the airport grounds?

A. No." (R. 254)

"15. Q. In regard to the use by the Army at the airport, does the Army have any control over the hangars on the airport grounds other than the Army hangars.

A. No, it does not." (R. 254)

Thus in *Causby* there can be no doubt that the local Authority operated the airport in the same manner and to the same extent as Allegheny County operates the Greater Pittsburgh Airport and that the United States used the Authority's facilities at Greensboro in the same manner and to the same extent as any other large aircraft operator uses an airport's facilities today.

This fact becomes even clearer when one studies the following tabulation which the Court of Claims made of the actual plane movements over a seven-month period relevant

| Date | Air liner | Civilian itinerant | Civilian local | Military | Monthly total |
|---|---|---|---|---|---|
| August 1943 | 242 | 289 | 2,584 | 1,576 | 4,691 |
| September 1943 | 226 | 111 | 4,082 | 1,384 | 5,803 |
| October 1943 | 256 | 115 | 3,647 | 1,598 | 5,656 |
| November 1943 | 238 | 162 | 3,336 | 1,750 | 5,486 |
| December 1943 | 232 | 147 | 3,892 | 1,542 | 5,813 |
| January 1944 | 200 | 149 | 6,220 | 1,647 | 8,216 |
| February 1944 | 184 | 112 | 854 | 1,552 | 2,702 |
| Total 7 months' period | 1,578 | 1,125 | 24,615 | 11,049 | 38,367 |

For present purposes, the significant fact emerges that of the 38,367 movements, only 11,049 were attributable to military aircraft and 27,318 were flights of non-government civilian aircraft.

Thus it is evident that this Court, in *Causby*, did not hold

the United States—as airport operator—liable for the invasion of Causby's rights. On the contrary, this Court held the United States to be the responsible party even though it is clear that the United States had no responsibility whatsoever for airport operations. It was the United States' aircraft that

> "passed over respondents' land and buildings in considerable numbers and rather close together." 328 U.S. at p. 259.

At no point in this Court's entire opinion is there the slightest inference that the Greensboro Airport Authority, the airport operator, was responsible for the Causby's damages. In fact, the question which this Court said was presented to it in *Causby* was

> "whether respondents' property was taken within the the meaning of the 5th Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes." 328 U.S. at p. 258.

This Court held that the aircraft operator—the United States—invaded the Causbys' land.

Similarly in the case at bar petitioner alleges that commercial airlines have flown their aircraft over his property, but as the Pennsylvania Supreme Court had observed

> "he offered no proof that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that 'There is no evidence of any control exercised over any aircraft by the County of Allegheny.' That finding, supported as it is by the record, precludes the claimant from recovering against the County in this proceeding." 402 Pa. 411, 168 A. 2d 123 (1961).

In the light of the foregoing, petitioner's contention that the County which admittedly flies no planes, nor exercises any control over the flight of aircraft, "took" his property under the authority of *Causby* is completely untenable. Far from supporting petitioner's contention that a reversal of the decision below is required by *Causby*, in point of fact, the opinion below is not only consistent with *Causby*, but required by *Causby*.

The rule thus laid down in *Causby* is not in any way changed or affected by the Federal Airport Act, 49 U.S.C. § 1101 *et seq.*, and the grant agreement which the County and the Federal Administrator have entered into pursuant to its terms. Petitioner's brief (pp. 16, 17) suggests that the County is liable to him for his alleged damages by virtue of the Federal Airport Act and the grant agreement. The fact, however, is that neither the Act nor the agreement has any bearng on the present controversy. In the first place, as the County's brief makes clear, whatever assurances the County has given to the United States under both the Act and the agreement have been carried out and there is and can be no claim that the County has breached any of its obligations in any respect.

Secondly, both the Act and the agreement are concerned solely with physical hazards and physical obstructions to air safety. The provision with respect to "easements or other interests in land or airspace" relates solely to structures or other land use "which would create a hazard" to the landing, taking off or maneuvering of aircraft or otherwise limit the usefulness of the airport. It cannot be plausibly claimed that the mere fact land outside an airport is owned or used by others creates a hazard to aviation or limits the use of the airport. Under the agreement the County is obligated to comply with the standards established by TSO N-18 (the CAA's Technical Standard Order No. 18)

which establishes specifications for obstruction-free approaches to airports. TSO N–18 specifies that objects which protrude into an imaginary surface should be removed or marked. TSO N–18 does not give any indication of the altitudes at which planes fly or fix or determine the limits of the navigable airspace. It merely provides substantial margins for aircraft safety. In short, TSO N–18 merely sets up standards for the purpose of determining what obstructions the Federal Administrator desires to be removed or marked. It has no application to the instant case.

Moreover, while the County has agreements with the airlines, the petitioner is not a party thereto, and the effect of the covenant of quiet enjoyment is not at issue in this case. Even assuming a possible breach, it would be grounds for a suit only by the airlines. It would have no bearing on the question of the County's liability to petitioner.

Finally we should note that *Causby* was commenced and decided before the passage of the Federal Tort Claims Act and hence the United States was then immune from suits sounding in tort. The only way the Causbys could get jurisdiction over the United States was by suing in the Court of Claims under the Tucker Act for an implied taking of their property. It was because of the Government's immunity from tort actions that this Court went beyond its primary finding that the flights were trespasses to consider whether they also constituted a taking. In the present case there is no reason to reach the constitutional question of a taking since here there is no problem of sovereign immunity from liability in tort. Thus no reason exists for extending the *Causby* holding to the point of declaring that the due process clause of the 14th Amendment requires that whenever flights by aircraft affect the use and enjoyment of property a remedy in the form of condemnation compensation must be afforded to the property owner.

To conclude, *Causby* fully supports the conclusion reached by the Pennsylvania Supreme Court in the instant case, that:

> "* * * there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, * * *." 402 Pa. 411, 168 A. 2d 123 (1961).

## Point IV

### The County Cannot Be Liable for Any Alleged Taking of Petitioner's Property Because the Flights of Which Petitioner Complains Have Been Immunized by Federal Law.

It is respectfully submitted that in no event can Allegheny County be held liable for any alleged "taking" of petitioner's property because Federal law has immunized the commercial airline flights which petitioner alleges are the cause of the "taking" of his property. In rejecting petitioner's claim of immunity, the Pennsylvania Supreme Court stated:

> "The county concludes, therefore, that the 'navigable air space' which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.
>
> "While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States* v. *Causby*, 328 U.S. 256 (1946)." 402 Pa. 411, 168 A. 2d 123 (1961).

We shall here show that *Causby* does not preclude the adoption of the immunity argument.

Petitioner contends that his property was taken on June 1, 1952—the date of the opening of the Greater Pittsburgh Airport (R. 33). As of that date, Federal regulations promulgated by the CAB pursuant to specific authorization contained in the Civil Aeronautics Act of 1938 were in effect. Section 3 of that Act [49 U.S.C. § 403] declared the existence of

> "a public right of freedom of transit in air commerce through the navigable air space of the United States * * *",

thus creating or recognizing the existence of an easement comparable to the public easement of navigation in navigable waters.

The term "navigable air space" was defined in § 1 (24) [49 U.S.C. § 401 (24)] to mean

> "air space above the minimum altitudes of flight prescribed by regulations issued under this Act."

§ 205(a) of the Act empowered the CAB to issue whatever rules and regulations are necessary in order to

> "exercise and perform its powers and duties under this Act." [49 U.S.C. § 425(a)]

and § 601 [49 U.S.C. § 551(a)] provided in part that

> "The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and reviewing from time to time * * * (7) Air traffic rules governing the flight of, and for the navi-

gation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft and between aircraft and land or water vehicles."

Pursuant to this authority, the Board issued "Civil Air Regulations", § 60.17 of which specified that no person shall operate aircraft over congested areas below an altitude of 1,000 feet or below 500 feet over non-congested areas

"Except when necessary for take-off or landing * * *".

The intent of the CAB that the 1,000-foot and 500-foot floors should not apply to aircraft landing and taking off is clear, as is also its intent that the minimums for those operations should be whatever altitudes are necessary for those purposes. Nevertheless, the court below rejected the County's claim of immunity under the above statutory and administrative provisions because of certain statements in *Causby*, 328 U.S. at p. 263, where Justice Douglas said that the fact that the glide path taken by the planes was that approved by federal regulations did not place the flights within the navigable air space which Congress had placed in the public domain.

While Justice Douglas did not expressly state what he was interpreting, an examination of the record on appeal in *Causby* makes it clear that he was not referring to the CAB's safe altitude regulation but rather to the CAA's then existing Technical Standard Order—18 (TSO N–18) which, as we have seen, is concerned solely with clearance criteria for structures in areas surrounding airports.

At all events, the CAB's minimum safe altitude regulation was materially amended after the *Causby* decision.

At the time of *Causby*, the minimum safe altitude regulation contained the following phraseology:

> "Exclusive of taking off from or landing upon an airport or other landing area * * *." 14 CFR, Cum. Supp. [1944] 60.350.

The word "necessary" which now expresses a clear, though necessarily flexible, standard of minimum altitude was introduced only subsequently. 10 Fed. Reg. 5066, 5067.

Moreover, since *Causby*, the CAB issued its "Interpretation No. 1" of July 22, 1954 in answer to a request made by the President's Air Coordinating Committee in its May, 1954 report on Civil Air Policy. The Air Coordinating Committee, after pointing out that

> "Doubt has been expressed as to whether the existing Federal regulations are so phrased as to make (the navigable airspace definition) operative throughout the take-off and landing operations of aircraft. *While this doubt is unjustified*, resolution of the matter to remove all doubt as to the affirmative exercise of the jurisdiction of the Federal government in the airspace navigable in fact is considered desirable." (p. 47), (emphasis added)

recommended that the

> "*Existing Federal regulations relating to minimum altitudes of flight should be reexamined by the appropriate agencies to determine whether revision of such regulations is necessary or desirable in order to dispel any possible inference that the Federal government has not exercised its regulatory jurisdiction over the entire flight of an aircraft in the airspace above the United*

*States navigable in fact.*" (*Civil Air Policy*, the President's Air Coordinating Committee, May, 1954, p. 47).

Interpretation No. 1, therefore, makes it clear that the take-off and landing exception

> "is * * * to be read as establishing a rule prescribing a changing but continuously effective minimum altitude for each instant of the climb after take-off and approach to landing; * * *." (C.A.R., Part 60, Interp. 1, 19 Fed. Reg. 4602).

The Interpretation points out that the CAB after reviewing its altitude regulations, Congress' intent, the subject's technical aspects, etc., determined that revision of the rules is neither necessary nor desirable since it had already prescribed the minimums for landings and take-offs. It concludes:

> "In consideration of the foregoing, the Board construes the words 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in § 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. *Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of Section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable air-*

*space.*" (C.A.R., Part 60, Interpretation No. 1, 19 Fed. Reg. 4663) (Emphasis added)

This conclusion is the official determination of the CAB itself, promulgated pursuant to the provisions of the Administrative Procedure Act. It accords not only with § 60.17's language but also with the intent of the Civil Aeronautics Act. It is clear that the flights in question—since the Board of Viewers specifically found that all were in accord with and none in violation of appropriate Federal rules and regulations—were within the navigable air space of the United States through which Congress granted a free right of transit.

The Federal Aviation Act of 1958 wrote into the Federal statute the legal situation as it then existed by virtue of the Civil Aeronautics Act of 1938, and the foregoing determination of the Civil Aeronautics Board. It not only reiterated the "public right of freedom of transit through the navigable airspace of the United States" found in the Civil Aeronautics Act of 1938, but expressly declared

> " 'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" § 101(24) (Emphasis added)

Thus, there can no longer be any doubt that Congress has declared a free right of transit to exist in the "airspace needed to insure safety in take-off and landing of aircraft." This is, of course, the law at the present time. Moreover, the Act appears to be merely declaratory of the law in existence at all times relevant to this litigation.

The minimum safe altitude regulations of the Civil Aero-

nauties Board were not discussed in this Court's opinion in *Causby* and this Court did not pass upon the effect of these regulations in defining navigable air space. However the United States District Court for the Eastern District of New York did pass upon the meaning of these regulations in its opinion in *Allegheny Airlines, Inc. et al.* v. *Village of Cedarhurst et al.*, 132 F. Supp. 871, 882 (E. D. N.Y. 1955), where it said:

> "The obvious meaning of the rule is that the minimum safe altitude for take-off or landing is whatever altitude is necessary for those operations. The Court construes the words 'except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing."

The District Court's holding on this point was affirmed by the Court of Appeals for the Second Circuit in an opinion by Judge Swan, 238 F. 2d 812, 815 (2 Cir. 1956).

Because this Court was not concerned with the minimum altitude regulations in *Causby* but rather with TSO N-18 and because those regulations were changed and made more specific and definite after the *Causby* decision, it is submitted that the decision below is incorrect insofar as it rejects the argument of immunity.

Since the flights of which petitioner complains were within the navigable air space through which Congress has declared a public right of freedom of transit to exist, a question may arise as to whether the United States has taken the petitioner's property within the meaning of the Federal Constitution.

Relevant in this connection is this Court's language in *Causby:* (p. 264)

> "If any airspace needed for landing or taking off were included in the navigable airspace, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking."

However that issue is one between petitioner and the United States and not between petitioner and the County. The fact is that Congress declared a right of transit to exist above the minimum altitudes for flight established by the Civil Aeronautics Board, and the CAB determined that in the case of aircraft landing and taking off the minimums should be whatever heights are necessary for that purpose. It may be that the Congressional declaration of a right of transit constituted a recognition of a pre-existing easement and merely limited its use to the space above the CAB minimums. Or it may be that whatever rights exist in air space, like those with respect to the marginal sea, have been created by the federal government. See *U. S.* v. *California*, 332 U. S. 19 (1947). Or it may be that Congress created the easement in the exercise of the right of eminent domain, and that property rights or interests of the petitioner were taken for which the United States must pay just compensation.

Interesting and important though these questions may be, they are not at issue in the present case. So far as this case is concerned, it is sufficient to say that the intent of Congress to establish or recognize the existence of the easement is clear,—that the CAB took the requisite action to establish minimums for landing and taking off,—that aircraft have a right of transit under the Act of Congress

and that a third party such as the County is not liable because the airlines choose to exercise this right.

Accordingly, it is respectfully submitted that the flights in question are immune by virtue of Congressional enactments and the County is not liable for any alleged "taking" of petitioner's property by virtue of those flights.

## Conclusion

Your *amicus* respectfully submits that the decision of the Pennsylvania Supreme Court should be affirmed because petitioner has failed to exhaust the remedies afforded him under both State and Federal law, and thus cannot, at least at this stage of the proceedings, maintain that the remedies available to him deny him unconstitutionally due process rights (*Points I* and *II*); and in any event no basis in law exists for petitioner's contention that the Allegheny County as the operator of the Greater Pittsburgh Airport has "taken" his property or otherwise tortiously interfered with his property rights (*Points III* and *IV*).

Respectfully submitted,

LEANDER I. SHELLEY,
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## APPENDIX A

UNITED STATES MEMBERS OF THE AIRPORT OPERATORS COUNCIL

Alaska—Department of Public Works
Atlanta Department of Aviation

Bakersfield—County of Kern (California)
Baltimore Department of Aviation
Birmingham Department of Aviation
Boston—Massachusetts Port Authority

Charlotte—Douglas Municipal Airport (North Carolina)
Chicago Department of Aviation
Cincinnati—Kenton County Airport Board (Kentucky)
Cleveland Division of Airports
Columbus Metropolitan Airport & Aviation Commission (Ohio)

Dallas Department of Aviation
Dayton Department of Aviation
Denver—Department of Public Works, City and County of Denver
Detroit—Board of County Road Commissioners, Wayne County

El Paso—City of
Evansville—Vanderburgh Airport Authority District (Indiana)

Fort Worth—City of

Grand Rapids—Kent County Aeronautics Board (Michigan)
Greenville Airport Commission (South Carolina)

Hawaii—Department of Transportation
Houston Department of Aviation

Jackson Municipal Airport Authority (Mississippi)
Jacksonville City Commission

Kansas City Aviation Department (Missouri)

Lincoln—Airport Authority of the City of Lincoln (Nebraska)
Los Angeles Department of Airports
Louisville & Jefferson County Air Board

Mason City Municipal Airport Commission (Iowa)
Memphis—City of
Miami—Dade County Port Authority
Milwaukee County Department of Public Works
Minneapolis—St. Paul Metropolitan Airports Commission
Muskegon County Airport Board of Trustees (Michigan)

Nashville Aviation Commission
New Orleans Aviation Board
New Orleans—Board of Orleans Levee Commissioners
Newark and New York—Port of New York Authority
Newport News—The Peninsula Airport Commission (Virginia)

Oakland—Port of Oakland Commission
Oklahoma City Airport Trust
Omaha Airport Authority
Ontario Airport Commission (California)
Orlando—City of

Philadelphia Department of Commerce
Phoenix—City of
Portland—Port of (Oregon)

St. Louis Department of Public Utilities
San Antonio Department of Aviation
San Diego—Port of
San Francisco—Airport Department, Public Utilities Commission
San Juan—Puerto Rico Ports Authority
Savannah Airport Commission
Seattle—Port of Seattle Commission
South Carolina Aeronautics Commission
Stockton—Department of Aviation, County of San Joaquin

Tampa—Hillsborough County Aviation Authority
Tulsa Airport Authority

Waterloo Airport Commission
West Palm Beach—Board of County Commissioners
Wichita Board of Park Commissioners
Wilmington—Levy Court of New Castle County,

(9034-0)